86 1516

Supreme Court, U.S.
FILED
MAY 1- 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1516

GARY W. REKLAU, On Behalf of Himself
and All Others Similarly Situated,

Petitioners,

v.

MERCHANTS NATIONAL CORPORATION, et al.

Respondents.

On Petition For A
Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

Douglass R. Shortridge, Esq.
Counsel for Petitioners.

One Indiana Square, Suite 2250
Indianapolis, Indiana 46204
(317) 635-9535

Central Publishing Company, Inc., Indianapolis, Indiana 46206

TABLE OF CONTENTS

Page

This Court has now clearly announced pre-emption by ERISA of all state causes of action against fiduciaries. — Under the Seventh Circuit Opinion Denying an ERISA cause of action, participants will be without a remedy .. 2

The Tax Court has now interpreted ERISA Title I (Labor Standards and Guidelines) and Title II (Internal Revenue Code) as one integrated whole to be construed together — this proper statutory interpretation conflicts with the Seventh Circuit 4

Conclusion 8

TABLE OF CASES

Page

Calfee, Halter & Griswald v. Commissioner, 88 TC No. 35, filed March 23, 1987, CCH Dec. 43,786..... 5, 6, 7, 8

Metropolitan Life Insurance Co. v. Taylor, No. 85-686, (U.S., S.Ct., April 6, 1987) 3, 4

Pilot Life Insurance Co. v. Dedeaux, No. 85-1043, (U.S., S.Ct., April 6, 1987)..... 2, 3, 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-1516

GARY W. REKLAU, On Behalf of Himself
and All Others Similarly Situated,

Petitioners,

v.

MERCHANTS NATIONAL CORPORATION, et al.

Respondents.

On Petition For A
Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

The petitioner, Gary W. Reklau, on behalf of himself and all others similarly situated, submits this supplemental brief pursuant to Rule 22.6 of the Rules of The Supreme Court of the United States, citing three recent cases which support the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Since the printing of the Petition and its filing on March 18, 1987, three new cases have been decided in the intervening time period which affect the court's consideration of the Petition. The three cases, two from this court and one from the United States Tax Court, support the petition. In addition, the

Tax Court case establishes a conflict with the Seventh Circuit which should be resolved by this court. (NOTE: On April 17, 1987 the respondents waived the filing of a brief in opposition).

This Court has now clearly announced pre-emption by ERISA of all state causes of action against fiduciaries. — Under the Seventh Circuit Opinion Denying an ERISA cause of action, participants will be without a remedy.

This court decided two ERISA cases on April 6, 1987. In the first, *Pilot Life Insurance Co. v. Dedeaux*, No. 85-1043, (U.S., S.Ct., April 6, 1987), the court decided that ERISA pre-empts a suit under state common law for improper processing of a participant's claim. At page 2 of the slip opinion in *Pilot Life*, the court reemphasized the congressional intent:

> "In ERISA, Congress set out to
>
> > "protect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." §2, as set forth in 29 U.S.C. §1001(b)."

The court further states that congress clearly expressed an intention that the civil enforcement provisions should be the exclusive vehicle for ERISA plan participants. The court finds support in an *amicus curiae* brief filed by the Solicitor General and states at page 10 of the slip opinion:

> "The Solicitor General, for the United States as *amicus curiae*, argues that Congress clearly expressed an intent that the civil enforcement provisions of ERISA §502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of §502(a) would pose an obstacle to the purposes and objectives of Congress. Brief for United States as *Amicus Curiae* 18-19. We agree.

* * *

> "The civil enforcement scheme of §502(a) is one of the essential tools for accomplishing the stated purposes of ERISA.[3]
>
> * * *
>
> "Under the civil enforcement provisions of §502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits. A participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause of action may seek removal of the fiduciary. §§502(a)(2), 409. In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. §502(g). See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)."

Massachusetts Mutual was quoted extensively in the petition. The open question suggested by Mr. Justice Brennan, with whom Justices White, Marshall and Blackmun joined, in the concurring opinion with regard to implied causes of action is reemphasized by the *Pilot Life* case. Since the federal courts are now the only available forum which has jurisdiction to address the many and varied claims which will arise under ERISA, this Court should now address the questions raised in the Seventh Circuit opinion.

On the same day, this court decided *Metropolitan Life Insurance Co. v. Taylor*, No. 85-687, (U.S., S.Ct., April 6, 1987). In the *Metropolitan Life* case, the court found, on the basis of *Pilot Life*, that not only are common law claims preempted by ERISA but such claims are also removable to federal court. The court states at page 4 of the slip opinion:

> "Under our decision in *Pilot Life Ins. Co. v. Dedeaux*, *ante*, p. _____, Taylor's common law contract and tort claims are pre-empted by ERISA. This lawsuit "relate[s] to [an] employee benefit plan." §514(a), 29 U.S.C. §1144(a).

It is based upon common law of general application that is not a law regulating insurance. See *Pilot Life Ins. Co. v. Dedeaux*, *ante*, at _____ - _____. Accordingly, the suit is pre-empted by §514(a) and is not saved by §514(b)(2)(A). *Ante*, at _____. Moreover, as a suit by a beneficiary to recover benefits from a covered plan, it falls directly under §502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes."

The court goes on to state at page 6 of the slip opinion that ERISA's civil enforcement provisions, which parallel section 301 of the Labor, Management Relations Act, are extremely broad as follows:

"But the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of §301 of the LMRA. Section 502(f) says:

"The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action." 29 U.S.C. §1132(f).

Cf. §301(a) of the LMRA, 29 U.S.C. §185(a). The presumption that similar language in two labor law statutes has a similar meaning is fully confirmed by the legislative history of ERISA's civil enforcement provisions."

These cases point out the broad remedial scope of ERISA. The cases further point out not only is there a pre-emption of state actions against trustees or fiduciaries for breach of duties and cases filed in state court are removable irrespective of the language in the complaint. Thus these two cases sweep into the federal court system virtually all claims of plan participants. These intervening cases should now be considered by this court as affecting the pending petition and the narrow view of the Seventh Circuit.

The Tax Court has now interpreted ERISA Title I (Labor Standards and Guidelines) and Title II (Internal Revenue Code) as one integrated whole to be con-

strued together — this proper statutory interpretation conflicts with the Seventh Circuit.

Since the filing of petitioners' original petition, the United States Tax Court has decided a case which supports petitioners' position that the labor and tax provisions of ERISA must be read together as one integrated statute to correct prior abuses. In the case of *Calfee, Halter & Griswald v. Commissioner*, 88 TC No. 35, filed March 23, 1987, CCH Dec. 43,786, the Tax Court held that ERISA is an integrated statute which should be construed and applied as a whole. The issue in that case was whether or not a prominent Cleveland law firms' pension plan was disqualified because it used Title I ERISA guidelines which the commissioner argued were contrary to the Title II revenue code provisions. A number of administrative disqualification cases were consolidated and by order by the chief judge the cases were assigned to Judge Williams for decision and opinion.

The Tax Court opinion carefully reviews the history of ERISA and the Tax Court overruled the Commissioners narrow interpretation of ERISA.

The Tax Court's analysis of ERISA affects the pending petition for writ of certiorari and should be considered in determining whether or not the Seventh Circuit's perception of ERISA should be reviewed. The Seventh Circuit adopted the district court's opinion which states as follows:

> "We agree with the district court's assessment of this issue:
>
> > "There is no basis, under §1202(c) or elsewhere in ERISA, to find that the provisions of IRC §401 — which relate solely to the criteria for tax qualification under the Internal Revenue Code — are imposed on pension plans by the substantive terms of ERISA."
>
> *Reklau v. Merchants Nat'l Corp.*, No. IP 84-1389-C, Mem. Op. at 8, (S.D. Ind. Oct. 11, 1985). We are convinced that had Congress intended that §401 of the I.R.C. be applicable to ERISA, it would have so stated in clear and unam-

biguous language as it did in 29 U.S.C. §1202(c) with §§410(a), 411 and 412 of the I.R.C.[9] We thus refuse to read §401(a) of the I.R.C. as applicable to ERISA." (A-7) 808 F.2d 628, 631.

The Seventh Circuit analysis of ERISA clearly conflicts with the Tax Court which stated Title I and Title II of ERISA were drafted in concert and to sever the labor law standards and guidelines from the tax law would result in an aberration as argued by the Tax Commissioner. While the opinion is available, petitioner quotes from the Tax Court opinion at length as follows:

> "ERISA was enacted to remedy perceived defects in the private retirement system. ERISA was designed to protect the rights of employees participating in private retirement plans, and to make the system more fair and more secure by providing standards for the organization and administration of plans, vesting rights, plan funding and plan termination. See ERISA section 2 at 88 Stat. 832. The bill was considered by the House Committee on Ways and Means and the House Committee on Education and Labor, and their Senate counterparts, and resulted from combining two separate bills — one to establish Federal labor law standards for the establishment and operation of pension plans, to be administered primarily by the Department of Labor; and one to amend the Internal Revenue Code of 1954 with respect to the qualification of pension plans for Federal tax purposes, to be administered by the Internal Revenue Service.
>
> "Title I of ERISA sets forth guidelines and standards governing the establishment and operation of pension plans. See generally 88 Stat. 832 et seq. The Department of Labor is given principal authority to administer and enforce the provisions of this title. See generally ERISA section 500 et seq., 88 Stat. 891 et seq. Title II of ERISA specifically amends the Internal Revenue Code of 1954 and, like Title I, sets forth guidelines and standards governing the establishment and operation of pension plans qualified for Federal income tax purposes. As reported by the House Committee on Ways and Means:

> This bill and the bill reported by the Committee on Education of Labor, are expected to jointly deal with participation, vesting, and funding with respect to pension plans. In these areas, this bill has been worked out in close coordination with the version of the bill expected from the Committee on Education and Labor to be sure that the general standards provided in these three areas are the same.*** H. Rept. 93-807, 93d Cong., 2d Sess. 1 (1974); 1974-3 (Supplement) C.B. 236.

"Although the fiduciary standards of ERISA section 403(c) were not enacted as part of the Internal Revenue Code, the statute is an integrated whole which, absent clear expression of contrary legislative purpose, should be construed and applied as a whole. The legislative history of the statute confirms that the fiduciary standards were developed in coordination among the labor law-writing committees and the tax-writing committees: (Emphasis Added).

> "Because of the *expected coordination* between your committee's bill and that of the Education and Labor Committee, no action is taken in this bill to deal with the general subjects of fiduciary standards, plan termination insurance, and reporting and disclosure, which are dealt with in H.R. 12906. [Emphasis added. H. Rept. 93-807, 93d Cong., 2d Sess. 1 (1974); 1974-3 (Supplement) C.B. 236.]

"Title I and Title II of ERISA were drafted in concert. To sever the Act as if Title I were unrelated to the tax law would result in the aberration argued for by respondent, viz, the presence in any plan of certain legal standards set forth in Title I would disqualify the plan for Federal income tax purposes. ERISA's fundamental purpose is to make pension plans more fair and secure for employees and to provide incentives through the tax law for employers to establish and participate in such plans. This balance, achieved by the legislature, would be upset by reading out of the state, for Federal income tax purposes, the reversionary clauses permitted by ERISA section

403(c)(2). See H.Rept. 93-807 at 2 ("Not only have the standards in the two bills been coordinated ***"). The standards of Title I and of Title II could hardly be viewed as having been coordinated, however, if an otherwise qualified plan (i.e., fully compliant with the fiduciary standards and other Internal Revenue Code requirements) could not qualify under Title II by virtue of having adopted the standards of Title I. Under respondent's view of ERISA only plans that ignored the standards of ERISA section 403(c)(2) would be qualified.

* *

"A grant of administrative jurisdiction pursuant to Title II of ERISA does not carry with it a grant of authority to ignore the standards and guidelines set forth in Title I of ERISA. This is especially true because the standards of Title I and Title II were closely coordinated by Congress specifically to develop a unified set of rules. Therefore, we decline to accept respondent's position."

Conclusion

The intervening court opinions of this court and the Tax Court, decided and handed down since the filing of the original petition, affect and support the position that this court should grant certiorari and review this important area of the law. The issues raised in the petition are of national concern and should be addressed by this court for the guidance of employers, employees and their advisors.

Respectfully submitted,

Douglass R. Shortridge, Esq.
Counsel for Petitioners

One Indiana Square, Suite 2250
Indianapolis, Indiana 46204
(317) 635-9535